STATE OF MICHIGAN

COURT OF APPEALS

LARRY JOHNSON,

Plaintiff-Appellant,

v

WILLIAM TILTON,

Defendant-Appellee.

UNPUBLISHED
October 15, 2002

No. 232374
Wayne Circuit Court
LC No. 00-000573-NO

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Defendant owned a house located at 2629 Lennox in the city of Detroit (Lennox premises). Defendant leased this house to Wolverine Human Resources (Wolverine), who used it as a youth group home. Plaintiff, an employee of Wolverine, was injured when he hit his head on a low-hanging ceiling while chasing a resident down a stairway in the house. This premises liability action ensued.

This Court reviews decisions regarding motions for summary disposition de novo. *Hall v McRea Corp*, 238 Mich App 361, 369; 605 NW2d 354 (1999). Motions brought under MCR 2.116(C)(10) test the factual support of a plaintiff's claim. *Id*. All reasonable inferences are resolved in favor of the nonmoving party. *Id*. at 369-370. When reviewing a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10), this Court considers the lower court record, including all pleadings, affidavits, depositions, admissions, and other documentary evidence submitted, in a light most favorable to the nonmoving party. *Lantz v Southfield City Clerk*, 245 Mich App 621, 625; 628 NW2d 583 (2001). When the evidence establishes that there is no genuine issue concerning any material fact, the moving party is entitled to judgment as a matter of law. *Id*.

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition because the court incorrectly concluded that a landlord is not liable for injuries sustained as the result of an unsafe condition existing on the leased property at the time of the execution of the lease.

Plaintiff has relied heavily on *Samuelson v Cleveland Iron Mining Co*, 49 Mich 164; 13 NW 499 (1882), as the basis for the principle that a landlord is liable for an injury sustained as the result of an unsafe condition existing on leased property at the time the lease was executed. Plaintiff relies on *Samuelson* to claim liability on the theory that defendant, as the owner of real estate, invited others onto dangerous premises. However, *Samuelson* is not applicable to the case at bar because defendant in this case could not be described as an invitor. This principle is clearly illustrated by a recent Michigan Supreme Court case, *Orel v Uni-Rak Sales Co*, 454 Mich 564; 563 NW2d 241 (1997). In *Orel*, the Court held that "[i]nvitors are subject to liability only if they are possessors." *Id*. at 569. Additionally, the Court stated:

> "*Premises liability is conditioned upon the presence of both possession and control over the land*. This is so because
>
> '[T]he man in possession is in a position of control, and normally best able to prevent any harm to others.'
>
> Michigan has consistently applied this principle in imposing liability for defective premises.
>
> Our application of this principle is in accordance with the Restatement of Torts. *The Restatement imposes liability for injuries occurring to trespassers, licensees, and invitees upon those who are 'possessors' of the land*. A 'possessor' is defined as:
>
> '(a) a person who is in occupation of the land with intent to control it or
>
> '(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
>
> '(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).'
>
> *Ownership alone is not dispositive. Possession and control* are certainly incidents of title ownership, but these possessory rights *can be 'loaned' to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility*." [*Orel, supra* at 568 (emphasis added in *Orel*), quoting *Merritt v Nickelson*, 407 Mich 544, 552-553; 287 NW2d 178 (1980).]

In *McCurtis v Detroit Hilton*, 68 Mich App 253, 256; 242 NW2d 541 (1976), this Court stated:

> However, it has also been held that a landlord will be liable for the injuries incurred by another even though the landlord has given up complete control, possession and use of the premises where: (1) at the time the premises is transferred to the tenant a hidden dangerous condition exists, the landlord knows or should have known of the condition and fails to apprise the tenant of it, or (2) the premises is leased for a purpose involving public admission and the landlord

> fails to exercise reasonable care to inspect and repair the premises before possession is transferred. [*Id*.]

"In the above two situations, a party is allowed to recover from a landlord on a nuisance as opposed to a negligence theory." *Id*., citing *Bluemer v Saginaw Central Oil & Gas Service, Inc*, 356 Mich 399; 97 NW2d 90 (1959).

In the instant case, defendant testified, in his deposition, that although he owns the Lennox premises, he does not maintain control over and is not in possession of it. Defendant further stated that the tenant at the Lennox premises, Wolverine, pays all the taxes and utilities for the Lennox premises and carries insurance for it. Defendant indicated that Wolverine actually selected the building as one suitable for its purposes of housing children and offices. Finally, defendant stated that Wolverine performs all the renovations and repairs of the Lennox premises itself, and that defendant is not involved in such decisions. Furthermore, the lease agreement entered into by defendant and Wolverine provides additional clarification regarding the terms of the lease. The lease agreement provides that Wolverine would pay for all the utilities and taxes for the building. The lease agreement also states that Wolverine is to "provide all maintenance and improvements necessary for the premises during the term of the lease and shall at all times maintain the premises in a secure, clean, safe, up-to-code condition suitable for use of the premises. . . ."

On appeal, plaintiff does not contest defendant's control or possession over the premises. Rather, plaintiff argues that defendant is liable for the defective premises irrespective of his possession or control of the premises. Contrary to plaintiff's assertion however, Michigan law is clear regarding a defendant's liability based on the theory of premises liability – there must be control or possession of the premises and ownership is insufficient. See *Orel*, *supra* at 568-569. It is clear from defendant's testimony and the lease agreement that defendant is not in occupation of the land with the intent to control it. Contrarily, Wolverine occupies and maintains complete control over the Lennox premises. Therefore, defendant cannot be classified as a possessor, and cannot be subjected to liability for negligence under a premises liability theory. See *Orel*, *supra* at 569. Accordingly, plaintiff's claim should have been brought under a nuisance theory as opposed to a premises liability theory of negligence. See generally, *Bluemer*, *supra* at 399; *McCurtis*, *supra* at 255.

Next, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition regarding plaintiff's nuisance claim. Although we disagree with the trial court's analysis, we agree with the ultimate conclusion that summary disposition was proper in relation to plaintiff's claim of nuisance per se.

Michigan law recognizes two types of nuisance, public and private. See generally *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190, 193; 540 NW2d 297 (1995). The *Cloverleaf* Court stated that an actor is:

> "subject to liability for private nuisance for a nontrespassory invasion of another's interest in the private use and enjoyment of land if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and

> unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct." [*Cloverleaf, supra* at 193, quoting *Adkins v Thomas Solvent Co*, 440 Mich 293, 304; 487 NW2d 715 (1992).]

Here, plaintiff has not alleged an invasion of his property. The premises at issue are owned by defendant and leased by Wolverine. Accordingly, plaintiff's claim does not appear to be based on private nuisance law.

Instead, plaintiff's claim could be more accurately described as a claim of public nuisance. The *Cloverleaf* Court described a public nuisance as follows:

> A public nuisance is an unreasonable interference with a common right enjoyed by the general public. The term "unreasonable interference" includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights. *Wagner v Regency Inn Corp*, 186 Mich App 158, 163; 463 NW2d 450 (1990). A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public. *Adkins*[, *supra* at 306 n 11]. [*Cloverleaf, supra* at 190.]

The *Cloverleaf* Court indicated that there are three instances when a defendant may be liable for damages stemming from a certain condition: "(1) the defendant created the nuisance, (2) the defendant owned or controlled the land from which the nuisance arose, or (3) the defendant employed another person to do work from which the defendant knew a nuisance would likely arise." *Cloverleaf, supra* at 191.

Public nuisance can be further broken down into two distinct categories: nuisance per se (nuisance at law) and nuisance in fact. The *Bluemer* Court defined the classes of nuisance as follows:

> "From the point of view of their nature, nuisances are sometimes classified as nuisances *per se* or at law, and nuisances *per accidens* or in fact. A nuisance at law or a nuisance *per se* is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. Nuisances in fact or *per accidens* are those which become nuisances by reason of circumstances and surroundings, and an act may be found to be a nuisance as a matter of fact where the natural tendency of the act is to create danger and inflict injury on person or property. The number of nuisances *per se* is necessarily limited, and by far the greater number of nuisances are nuisances *per accidens*. For this reason whether or not a particular thing or act is a nuisance is generally a question of fact . . . to be determined in the first instance before the term 'nuisance' can be applied to it." [*Bluemer, supra* at 411, quoting 66 CJS, Nuisances, § 3, pp 733-734.]

However, this Court has stated that "[t]he question as to what constitutes a nuisance per se is a question of law for the court . . . ." *Beard v Michigan*, 106 Mich App 121, 124; 308 NW2d 185 (1981).

On appeal, plaintiff argues that the condition of the building, specifically regarding the allegedly defective stairwell, constituted a nuisance per se. Plaintiff further argues that the stairwell headroom was insufficient and in violation of code at all times, which made it a nuisance at all times and under any circumstances regardless of its location or surroundings. In his reply brief, plaintiff contends that the stairwell violated building codes and fire or safety ordinances, and that the Lennox premises may be classified as a dangerous building under MCL 125.539, which renders the building a nuisance per se.

Although plaintiff's claim may arguably be defined as a public nuisance, we find that plaintiff's claim does not fall under the definition of "nuisance per se." A nuisance per se "is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings." *Bluemer, supra* at 411. Here, the stairwell may not be classified as a nuisance per se because it does not constitute a nuisance at all times and under any circumstances. Defendant states that if the building was not in use, the low ceiling would present no threat at all. In his motion to amend his complaint, plaintiff indicates that he was chasing a youth in the Lennox premises, and that, while passing through the stairwell, he violently hit his head on the ceiling above the stairs, which suggests that plaintiff was not using a cautious gait when using the stairway in question. Plaintiff provided the affidavit of a licensed builder, Ronald K. Tyson, which stated:

> The Owner of the subject property knew from the beginning that unruly and delinquent youths, up to 21 years of age, would reside at the subject facility . . . . He knew or reasonable [sic] should have known that in addition to normal access of the stairway, which, includes hurrying that some of the youth may go [sic] or try to go truant and would not be accessing the stairway in a cautious gait. That to run up or down a stairway will elevate the users height thus requiring more headroom that the deficient amount of 74" provided for the staff and residents in the instant manner.

Together, this evidence provides support for defendant's contention that the stairwell is not a nuisance at all times and under any circumstances, regardless of location or surroundings, as it appears that persons who are shorter in stature or those that utilize a cautious gait when using the stairway would not suffer the injuries sustained by plaintiff. Accordingly, we find that the stairwell cannot be classified as a nuisance per se.

Plaintiff's argument that the stairwell violated building codes and city and state ordinances is in and of itself insufficient to defeat summary disposition of his nuisance per se claim. In *Garfield Twp v Young*, 348 Mich 337; 82 NW2d 876 (1957), the Michigan Supreme Court expressly rejected a similar argument. In *Young*, the plaintiff sought to enjoin the operation of a junkyard on the grounds that it was a public nuisance, because the junkyard was being operated without a license as required by the plaintiff township. *Id*. at 339. On appeal, the Court noted that the operation of a junkyard was not a public nuisance per se under prior case law. *Id*. at 340. The plaintiff argued that the mere operation of the junkyard in violation of the

resolution constituted a nuisance per se; however, the Court rejected this argument. *Id*. The Court stated:

> "The erection of a wooden building within the limits of a city or village is not in and of itself a nuisance. Neither does the fact that the erection of such is prohibited by ordinance make it a nuisance. If this were so, then the doing of any act prohibited by law would, upon the same reasoning, be a nuisance. The act, if prohibited, would be illegal; but something more than mere illegality is required to give this court [equitable] jurisdiction." [*Garfield Twp*, *supra*, 348 Mich 340, quoting *Village of St Johns v McFarlan*, 33 Mich 72; 20 Am Rep 671 (1875).]

Thus, plaintiff may not rely solely on his contention that the condition of the stairway violates ordinances or building codes. As it is apparent that the stairway is not a nuisance at all times and under any circumstances regardless of location or surroundings, plaintiff's complaint of nuisance per se was properly dismissed.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Hilda R. Gage